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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PHILLIP PAULSON v. CITY OF SAN DIEGO
United States District Court Case No. 89cv00820-GT(POR)

INTRODUCTION

On June 26, 2002, an *en banc* panel of the Ninth Circuit Court of Appeals ruled the City's second sale of public land surrounding the Mt. Soledad cross "violated Article XVI, Section 5 of the California Constitution" because the manner of the sale provided financial benefit to parties who intended to maintain the cross on the property as opposed to those who would remove it. In its ruling, the Ninth Circuit observed "there are several possible ways to cure [the] violation" and left it to the parties and the United States District Court ["District Court"] to devise "a remedy for the constitutional violation." The *en banc* ruling presents the City a difficult dilemma: either remove the cross or fashion another sale of the Mt. Soledad property. Complicating resolution of this dilemma is the extensive war memorial the Mt. Soledad War Memorial Association ["Association"] has constructed on the property over the last five years. This memorandum sets forth two options for correcting the violation: (1) negotiating a settlement with the plaintiff that would include removal of the cross from the property; or (2) rescinding the sale to the Association, and reselling the property surrounding the cross.

BACKGROUND

The first cross on Mt. Soledad was constructed of redwood in 1913. Three years later, the City Council dedicated the property as a public park. Vandals destroyed the cross in 1923, and strong winds destroyed its wood-stucco replacement in 1952. Later that year, the City Council authorized the Association to erect the present cross which is constructed of reinforced concrete. In 1954, the Association dedicated the cross as a memorial to veterans of World War I, World War II, and the Korean War.

1. First Sale of Mt. Soledad Property.

In 1989, Plaintiff Phillip Paulson brought suit in District Court complaining the presence of the cross on City property violated provisions in both the United States and the California Constitutions. The District Court ruled the presence of the cross on City property violated the California Constitution and issued a permanent injunction forbidding the existence of the cross

on public property. As a remedy, the City Council voted to sell to the Association a small area of parkland immediately surrounding the cross. As required by the Charter, the City Council placed Proposition F on the June 1992 ballot to obtain voter approval of this sale of public parkland.

Proposition F sought voter approval for “removal from dedicated park status of that portion of Mt. Soledad Natural Park necessary to maintain the property as an historic war memorial, and the transfer of the same parcel . . . to a private non-profit corporation for not less than fair market value.” At that time, the only structure atop Mt. Soledad was the cross. Some of the ballot material associated with the campaign to approve the proposition stated the purpose of the proposition was to “SAVE THE CROSS.” San Diego voters approved Proposition F by over 76 percent, and the City subsequently sold the 222 square-foot parcel immediately beneath the cross to the Association.

Plaintiff Paulson objected to the sale and moved the District Court to enforce the injunction. The District Court voided the 1994 sale finding it violated the California Constitution in three respects: (1) the conduct of the sale created the appearance of favoring the Christian religion; (2) excluding other potential purchasers gave the appearance the City’s purpose for conducting the sale was to preserve the cross; and (3) the sale involved too small a plot of land to remedy the violation.

2. Second Sale of Mt. Soledad Property.

The City subsequently conducted a second sale of one-half acre of land surrounding the cross. The City solicited public bids “for the purpose of maintaining an historic war memorial.” The cross was still the only structure atop Mt. Soledad that could be considered a war memorial. The City neither required nor precluded retention of the cross as a condition of the sale. The Association made the highest bid of \$106,000, took title to the property in 1998, and commenced an improvement program in 1999 as required by the terms of the sale. The Association built a world-class memorial honoring military veterans. The memorial now consists of extensive landscaping and walls of granite plaques engraved with the names and photographs of veterans of various wars. The landscaping and walls of plaques, which are to the west of the cross, occupy approximately two-thirds of the one-half acre purchased by the Association. The Association currently installs the plaques in return for contributions ranging from \$600 to \$1,000 per plaque. Today, over 1,500 plaques honoring over 3,000 veterans grace the granite walls of the Mt. Soledad Memorial.

Plaintiff objected that the terms of the second sale also violated the United States and the California Constitutions. The District Court, however, upheld the sale and found the City had acted properly and legally. Plaintiff appealed to the Court of Appeals for the Ninth Circuit, which unanimously rejected Plaintiff’s arguments and found the City’s sale valid under all relevant constitutional provisions. Plaintiff then requested an *en banc* panel of eleven judges to review the decision upholding the sale. *En banc* hearings are extremely rare, but in this instance, such a hearing was conducted. The *en banc* panel voted 7-4 to reverse the decision of the District Court. The panel, after observing that conducting a sale to ensure the presence of a war memorial was both an appropriate and nonsectarian purpose, used an unprecedented economic analysis to

hold the sale violated Article XVI, section 5 of the California Constitution. It made this finding by reasoning the terms of the sale provided a financial advantage to bidders who wished to preserve the cross on the property because bidders who planned to remove it would have to bear the costs of removing and constructing a substitute memorial. Plaintiff had not raised the legal basis for the ruling in his briefings to the *en banc* panel. As a result, the City was not afforded an opportunity to argue the issue that resulted in the final ruling. The City Council voted to authorize an appeal to the United States Supreme Court. The Supreme Court, however, declined to hear the City's appeal of the *en banc* ruling. Thus, although fourteen federal judges have now reviewed the case with seven judges agreeing with the City and seven judges disagreeing with the City, the Ninth Circuit *en banc* ruling stands and must be followed.

The Ninth Circuit's *en banc* ruling left it to the District Court and the parties to identify and select appropriate means to remedy the sale's violation of the California Constitution. The District Court has monitored the progress of negotiations involving the Plaintiff, the Association, and the City by requiring the parties appear before it at regular status conferences. At the May 14, 2004 Status Conference, the District Court was advised this matter was to be presented to the City Council on July 20, 2004. The Court announced that the City was an integral party to any settlement and that the Court would closely review any proposed remedy. The next status conference is scheduled for August 6, 2004.

ANALYSIS

The City must now find a remedy for the constitutional violation identified by the Ninth Circuit's *en banc* ruling. Remedying this violation requires either removal of the cross or another sale of the Mt. Soledad property that will pass the scrutiny of the Ninth Circuit. The selected remedy should consider the Association's rights, including its significant financial expenditures, and the interests of the citizens who purchased plaques now installed at the memorial.

Four separate constitutional provisions affect the presence of the cross on Mt. Soledad: one in the United States Constitution ("Establishment" Clause in the First Amendment) and three in the California Constitution ("No Preference" Clause in Article I, section 4; "Establishment" Clause in Article I, section 4; and the "No Aid" Clause in Article XVI, section 5). The Ninth Circuit has given an expansive interpretation to the California Constitutional provisions, and any selected remedy must avoid giving the appearance of preference for, or aid to, religion. Court rulings have found the cross to be a religious symbol, the religious significance of which is not diminished by designating or using it as a war memorial.

Three unique legal issues complicate identification and execution of viable remedies. These issues are: (1) the impact of the Ninth Circuit's ruling on the present ownership of the one-half acre of land which the City sold to the Association; (2) the legal and equitable rights of the Association in view of its improvement of the property as well as the rights of the citizens who purchased plaques from the Association; and (3) the validity of the authorization provided by Proposition F to remove a portion of property from the Mt. Soledad park. Each issue is discussed below.

1. Ownership of the Mt. Soledad Property.

The City provided the Association a deed facially conveying legal title to the property when the Association purchased the property at the second sale. California law controls this real estate issue. While the validity of title to public property obtained through an unconstitutional sale is a matter of first impression in California, longstanding legal principles provide guidance indicating the *en banc* ruling voids both the sale of Mt. Soledad land to the Association and the deed provided to the Association.

While no recent California cases directly address this issue, in *Hardenburgh v. Kidd*, 10 Cal. 402, 403 (1858), the California Supreme Court voided the sale of land where the sale was based on an unconstitutional statute. Similarly, the California Supreme Court in *Low v. Lewis*, 46 Cal. 549, 552 (1873), ruled that the illegality of a tax law voided the tax lien sale of land belonging to the City of San Francisco and that the deed did not convey title to the property. In *Klauber v. Higgins*, 117 Cal. 451, 458-59 (1897), the California Supreme Court used rulings of the United States Supreme Court for precedence when it held that a transfer of public land was void where the transfer was not authorized by law.

The import of these rulings is that the second sale of Mt. Soledad property to the Association should be void because the sale violated the California Constitution and therefore, the deed did not give the Association legal title to the property. As a result, the City should still be the legal owner of the property, the Association's status is that of a "good faith improver" as defined by Code of Civil Procedure ["CCP"] section 871.1, and the sale must be rescinded either by the District Court's own ruling or as result of a motion by the City.

2. Rights of the Association and Plaque Purchasers.

The Association's good faith purchase and improvement of the property provide it both equitable and statutory rights. Under CCP section 871.1, a good faith improver is "[a] person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land." The Association spent over \$900,000 on the Mt. Soledad property while under the mistaken belief that it held valid title to the property. Although the City is the actual owner of the property, under the principle of substantial justice, the Association, as a good faith improver, has equitable rights that must be respected. In addition, under Civil Code section 1692, rescission of the contract will obligate the City to reimburse the Association the \$106,000 purchase price of the property.

The citizens who contributed to the Association in exchange for installation of plaques also have equitable rights. These citizens made their respective contributions in the reasonable belief that the City's sale of the Mt. Soledad property was valid and that the plaques would be preserved and maintained. Although the purchasers have no contractual relationship with the City, fairness and equity support the argument that rescission of the sale to the Association puts the City in the shoes of the Association and places a duty on the City to ensure the plaques are

preserved. The selected remedy must recognize this duty and account for the interests of the plaque holders.

3. Validity of Proposition F.

Section 55 of the City's Charter requires any change to dedicated parkland be authorized by a two-thirds vote of the electorate. Both the first sale and the second sale of Mt. Soledad parkland to the Association depended on Proposition F to satisfy the Charter's requirement for voter authorization of a sale of parkland.

Although the *en banc* panel did not rule on the validity of Proposition F, its ruling indicated the panel considered Proposition F constitutionally flawed. The only emphasized texts in the entire ruling were those dealing with Proposition F's stated purpose to "maintain an historic war memorial." However, the cross was the only structure atop Mt. Soledad that could be considered a war memorial until 1999 when the Association began improving the property. In reciting the factual background of the case, the *en banc* panel noted that the campaign to approve Proposition F included statements by the then mayor, deputy mayor, and several City Council members explaining the purpose of the proposition was to "SAVE THE CROSS." This emphasis indicates the *en banc* panel may have considered the proposition an effort by the City to keep the cross atop Mt. Soledad. The *en banc* ruling pointed out that Article XVI, section 5 of the California Constitution "specifically prohibits the transfer of real or personal property for any sectarian purpose." If the Court were to address this issue and conclude that Proposition F was put before the voters in an attempt to maintain the cross, the California Constitution would nullify the authority of Proposition F to change the use of dedicated parkland.

Thus, if the selected remedy involves another sale of Mt. Soledad parkland, the sale cannot rely on the authority provided by Proposition F. A fresh proposition, free of the taint associated with Proposition F and the campaign surrounding it, would have to be presented to the voters. A new proposition would also allow the citizens of San Diego a voice in the outcome of this sensitive, long-enduring issue.

OPTIONS

1. Remove the Cross.

Plaintiff seeks to settle this matter by removing the cross and possibly relocating the cross to another location. The plaintiff would like to see the Association pay the estimated \$40,000 relocation cost. However, significant legal difficulties are associated with such a possible settlement.

There is no warranty that relocating the cross would remedy the constitutional violation that occurred at the time of the second sale. As the Ninth Circuit just stated in *Buono v. Norton*, 2004 WL 1238143 (9th Cir. June 7, 2004), which involved a cross on national parkland, correcting a constitutional violation requires the remedy to completely and irrevocably eradicate

the effects of the alleged violation. This relocation option relies on the now suspect authority of Proposition F. It is unlikely that reliance on Proposition F, passed in 1992 by San Diego voters, will satisfy the complete and irrevocable eradication criteria set forth in *Buono*. Further, the suspect authority of Proposition F also opens the City to litigation by third parties who may complain the City sold Mt. Soledad parkland to the Association in violation of the Charter.

The uncertainties associated with the validity of Proposition F and the second sale of the property raise the potential for additional protracted litigation against the City and the Association by persons or organizations who may contest the Association's right to continued ownership of the property. If the City does not prevail in this litigation, it will be liable for the attorney's fees and litigation costs of the prevailing plaintiff. Such fees and costs would have the potential to be quite substantial. At a minimum, if this settlement option is selected, the Association must be required to defend and indemnify the City against litigation arising from its retention of the property in order to adequately protect the City from the prospect of being assessed onerous attorney's fees and costs.

Relocation would also involve significant land use legal issues. Building permits and other matters associated with the relocation would have to be resolved and approved. Each issue has the potential to derail the settlement and leave the City in continued violation of the California Constitution and the permanent injunction issued by the District Court in 1992.

2. Rescind the Sale to the Association and Conduct A Third Sale of the Property.

Although the Association currently holds title to the Mt. Soledad property, the Ninth Circuit's ruling implies the District Court has authority to rescind the second sale and restore title to the City. With the title restored, the City could negotiate a long-term land lease with the Association at fair-market value. Fair-market value would likely be at or near the amount paid by the Association in 1998. This lease could and should include the land under the cross, but should also specify that the Association has no rights to the cross and that a subsequent purchaser would be entitled to have the cross removed on taking possession of the Mt. Soledad property. Such a lease protects the Association's investment in the new Mt. Soledad War Memorial and provides for the Association's continued preservation and maintenance of the existing Memorial. The lease can also protect the rights and interests of those who contributed to the Association to have plaques installed.

Having resolved the rights of both the Association and the contributors, the City would be able to conduct a new sale of the land atop Mt. Soledad. The area of land to be sold would include the Association's leasehold and whatever additional property needed to bring the sale within Constitutional restraints. The successful bidder would be required to advise the City within thirty days of taking possession of the property of its choice as to retention or removal of the cross. If the purchaser chose to have the cross removed, the City could schedule and effect the removal at no cost to the purchaser. The terms of sale would also specify that the sale was subject to the Association's leasehold and that the land outside the leasehold would be restricted

to open space. As the owner of the property, the purchaser would receive lease payments made by the Association.

There is precedence that the sale of public land, containing a religious symbol, can pass constitutional muster. At 938 feet above sea level, Mt. Davidson is the highest hill in the City of San Francisco. Mt. Davidson is the site of a 40-acre park with a 109-foot tall cross in the cleared space on top of the mountain. When the District Court in San Francisco ruled the Mt. Davidson cross violated the “No Preference” Clause of the California Constitution, the City sold 0.38 acres of cleared land around the cross by open auction. Two citizens complained the sale violated the United States and California Constitutions. The District Court found the sale proper, and the plaintiffs appealed to the Ninth Circuit. The Ninth Circuit affirmed the sale’s legality in a memorandum opinion entitled *Kong v. City and County of San Francisco*, 18 Fed. Appx. 616 (9th Cir. 2001). The opinion, which was filed prior to the *en banc* review of the second sale of Mt. Soledad, found that the sale was a satisfactory remedy under the “Establishment” Clause of the United States Constitution as well as the “No Preference” Clause and the “Establishment” Clause of the California Constitution, Article I, section 4. Although the opinion did not examine the sale under the “No Aid” Clause of Article XVI, section 5, the United States Supreme Court refused plaintiff Kong’s request for review of the decision.

As discussed above, a new sale of the Mt. Soledad property would require voter approval by a new proposition. The *en banc* ruling pointedly noted that ballot material associated with Proposition F in 1992 appeared to equate the proposition’s term “historic war memorial” with the cross. The new proposition would remove this appearance of government support of a religious symbol by specifically defining “war memorial” as the landscaping and walls of granite plaques exclusive of the cross.

While numerous challenges will confront the drafting of the terms and conditions of a new sale, they can be overcome. The actual terms of the sale will have to be carefully constructed to avoid constitutional violations. Modeled after San Francisco’s sale of Mt. Davidson, the sale would be by open and public bid. The sale would be subject to the Association’s lease of the war memorial grounds and would require only that the land outside the memorial grounds must remain open space. This would permit the prevailing bidder to freely elect to leave the cross in place or remove it.

RECOMMENDATION

Leasing the footprint of the existing Mt. Soledad War Memorial will ensure the continued existence of the new Memorial improvements by respecting the rights of the Association and its contributors. A new sale of the land atop Mt. Soledad, authorized by a new proposition, will resolve the constitutional violation associated with the City’s second sale of the Mt. Soledad property. The *en banc* ruling implied the language of Proposition F and the ballot material supporting the proposition evidenced that the City was impermissibly attempting to keep the cross in place. The new proposition, which is an integral part of third sale option, will permit a

properly constructed and neutral open sale of the property. The high bidder will then determine whether to maintain the cross on its private property, remove it, or relocate it.

This Office recommends the Council adopt a resolution which directs the City Attorney take appropriate action to rescind the sale of the Mt. Soledad property, lease the land under the new Memorial to the Association, draft an authorizing ballot measure for the November 2004 election, and develop the constitutionally proper means to sell the parkland atop Mt. Soledad. Once sold to the high bidder, the new owner of the private property would then determine whether the cross was to remain in place or whether the City was to remove the cross with a possible relocation to an appropriate site on private property.

Respectfully submitted,

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